Review of the "Amendment of the Nuclear Energy Act in connection with the setting-up of the Nuclear Safety and Radiation Protection Authority" of the Netherlands

July 2014

Introduction

1. The International Atomic Energy Agency (IAEA) has been requested by the Netherlands to review the "Amendment to the Nuclear Energy Act in connection with the setting-up of the Nuclear Safety and Radiation Protection Authority". To this end, the following documents were provided: (i) Bill of 2 July 2014 for the Amendment of the Nuclear Energy Act in connection with the setting-up of the Nuclear Safety and Radiation Protection Authority ("the Draft Bill"); (ii) Act of 21 February 1961 laying down the rules on the release of nuclear energy and the use of radioactive materials and equipment emitting ionising radiation ("Nuclear Energy Act"); (iii) Explanatory Memorandum of the Draft Bill ("Explanatory Memorandum"); and (iv) Relevant articles of the Autonomous Administrative Bodies Enabling Act ("IAAs Enabling Act").

2. At the outset, it is noted that the Draft Bill is intended to **"pool central governmental duties, responsibilities, powers, knowledge and expertise in the area of nuclear safety and radiation protection, the associated crisis preparation, and security and safeguards as far as possible in an independent authority for the promotion of nuclear safety and radiation protection, the associated crisis preparation, and security and safeguards"**.[1] It creates the "Nuclear Safety and Radiation Protection Authority (NSRPA)" as an Independent Administrative Authority (IAA) pursuant to the IAAs Enabling Act and amends the Nuclear Energy Act to that end. It is also noted that according to the latter Act an IAA is "a central government administrative body that is invested by law with public authority and is not hierarchically subordinate to a Minister."[2], which "form(s) part of the legal entity of the State of the Netherlands."[3]

3. It is further noted that the analysis leading to the elaboration of the Draft Bill concluded that **"In view of the fact that the international requirement of the independence of the NSRPA can best be achieved in the Netherlands with an IAA, and in view of the IAEA's preference in its recommendation for an IAA, and given the IAEA's concern about placing the NSRPA under the Minister of Economic Affairs, the government has decided to place the NSRPA under the Minister of Infrastructure and the Environment as an IAA"**.[4] It is noted in particular that the legislature may derogate from the rules of the IAAs Enabling Act[5] and that the Draft Bill does so to allow NSRPA to carry out its duties independently.[6]

4. The IAEA welcomes this significant step for the creation of an independent nuclear regulatory body in the Netherlands and has reviewed the Draft Bill in terms of establishment of the regulatory body, assignment of regulatory functions and overall clarity and consistency, in line with the relevant international legal instruments, IAEA safety standards and guidance

[1] Draft Bill, preamble.
[2] Explanatory Memorandum, page 5, 263-264.
[3] Explanatory Memorandum, page 11, 677-678.
[4] Explanatory Memorandum, page 7, 378-383.
[5] Explanatory Memorandum, page 9, 506-515.
[6] Explanatory Memorandum, page 11, 623-647.

documents.[7] The review has been conducted by the Office of Legal Affairs together with the Department of Nuclear Safety and Security. The results of the review are summarized below.

Establishment of NSRPA

5. The Draft Bill creates the "Nuclear Safety and Radiation Protection Authority (NSRPA)" and enumerates in new Section 3(3) the duties of NSRPA with regard to "nuclear safety and radiation protection, the associated crisis preparation, and security and safeguards". The Draft Bill also transfers to NSRPA many of the regulatory functions originally assigned to the Minister of Economic Affairs (and other Ministers) under the Nuclear Energy Act. These include, *inter alia*, the power to grant, suspend and revoke licenses and all associated powers and obligations. For these purposes, the Draft Bill places these duties under the NSRPA ("the Authority"), instead of the Minister of Economic Affairs (and other Ministers) and amends all relevant sections of the Nuclear Energy Act accordingly.

6. While the highest level of independence is normally achieved by the regulatory body being attached to the highest level of functional State supervision, it is noted that the Minister of Infrastructure and Environment does not appear to have functions related to the development of nuclear activities.[8]

7. The Explanatory Memorandum was very useful for the reviewers in understanding the status of NSRPA as an Independent Administrative Authority (IAA) pursuant to the Autonomous Administrative Bodies Enabling Act ("IAAs Enabling Act"), the scope of regulatory functions assigned to the new NSPRA and other provisions of the Draft Bill. However, some provisions of the Draft Bill appear to be clear only when read in conjunction with the Explanatory Memorandum. For instance, there appears to be only one reference in the Draft Bill to the IAAs Enabling Act (new Section 12b(4)). It would be useful to include in new Section 3(1) a general reference to the status of NSRPA as an IAA and its mission, as referred to in the Explanatory Memorandum.[9]

8. Furthermore, it is noted that, as described in the Explanatory Memorandum, NSRPA will not be the only nuclear regulator in the Netherlands, given that other bodies will retain functions pertaining to the regulatory control of nuclear activities.[10] However, the delineation of regulatory functions assigned to the NSRPA and other bodies does not appear to be clear from the provisions of the Nuclear Energy Act, as amended by the Draft Bill. The Draft Bill could usefully be revised to provide for more clarity in this respect, in line with other applicable legislation and, to the extent possible, further integrate nuclear regulatory functions in the new NSRPA, with the view to enhancing effective and independent regulatory control and avoiding overlaps of regulatory functions.[11]

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[7] Reference is made in particular to the Convention on Nuclear Safety, the Joint Convention on the Safety of Spent Nuclear Fuel Management and on the Safety of Radioactive Waste Management, the Convention on the Physical Protection of Nuclear Material and its Amendment and the Code of Conduct on the Safety and Security of Radioactive Sources, as well as the following IAEA publications: Handbook on Nuclear Law; Handbook on Nuclear Law: Implementing Legislation; and General Safety Requirements Part 1 (Governmental, Legal and Regulatory Framework).
[8] Explanatory Memorandum, page 14, 831-870.
[9] Explanatory Memorandum, page 12, 726-728.
[10] Explanatory Memorandum, page 14, 831-870.
[11] See paragraphs 14-20 below for further comments on regulatory functions.

Composition of NSRPA

9. Pursuant to new Section 5, the NSRPA shall consist of three members including the chair. Under new Section 6, the Minister of Infrastructure and Environment is responsible for the appointment, suspension and dismissal of the members of NSRPA. However, in order to ensure a high level of independence, it may be useful, if possible under the national legal and institutional system, to consider assigning this task to a higher government appointing authority in the Netherlands. Furthermore, it is suggested that the dismissal of NSRPA members be further regulated to expressly prevent unjustified dismissal with a view to furthering independence in the exercise of their duties.

Human and Financial Resources of NSRPA

10. It is recalled that "the regulatory body shall employ a sufficient number of qualified and competent staff, commensurate with the nature and number of facilities and activities to be regulated, to perform its functions and to discharge its responsibilities".[12] However, the NSRPA will not have its own staff, but staff to be made available by the Minister of Infrastructure and Environment pursuant to new Section 10. Furthermore, this staff will form part of the civil service and constitute a department of the Minister, without formally being part of NSRPA.[13] Accordingly, it is suggested that further mechanisms be considered in the Draft Bill to ensure that NSRPA is able to independently assess and to recruit the number of qualified and competent staff required to perform its duties. In addition, it may be useful to clarify in the Draft Bill that the staff will be under the authority of NSRPA and not under the authority of the Minister, as clarified in the Explanatory Memorandum and stated in the IAAs Enabling Act.[14]

11. The Minister of Infrastructure and Environment is required under new Section 9 to make sufficient funding available to NSRPA for the exercise of its duties. It would be more appropriate if NSRPA's budget would be prepared by it and approved by the competent bodies as a separate budget and not as part of the Minister's budget. For instance, budget cuts within the Minister of Infrastructure and Environment should not jeopardize the availability of financial resources required by NSRPA to exercise effective regulatory control over nuclear activities and facilities. At the same time, it is noted however that certain mechanisms are provided in the Draft Bill to address the issue of adequate funding within the chosen structure.

Annulment of NSRPA Decisions by Minister

12. The Draft Bill (new Section 12c) provides that the Minister of Infrastructure and the Environment may only annul a decision of NSRPA on the basis of incompatibility with the law. While noting that this is already a derogation of the IAAs Enabling Act, which would also allow the Minister to annul decisions on account of conflict with the public interest,[15] it is a provision that should only be foreseen in the context of appeals procedures against NSRPA decisions in order to eliminate the potential of arbitrary interference by the Minister with NSRPA activities.

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[12] GSR, Part 1, Requirement 18.
[13] Explanatory Memorandum, Notes on Individual Sections, page 10.
[14] Explanatory Memorandum, Notes on Individual Sections, page 5.
[15] Explanatory Memorandum, page 11, 633-642.

Independence of NSRPA from other Ministers

13. It has already been mentioned that, given the role of the Minister of Economic Affairs in the promotion of nuclear energy,[16] the Draft Bill places NSRPA under the Minister of Infrastructure and Environment. However, there are still some provisions granting the Minister of Economic Affairs (and other Ministers) influence in certain areas of work of NSRPA. It is thus suggested to delete or to revise the following provisions, which may allow interference by Ministers with development and promotion responsibilities in regulatory functions:

- NSRPA shall send its annual report to the Minister of Economic Affairs (and other Ministers) (new Section 11 of the Nuclear Energy Act).

- The Minister of Economic Affairs (and other Ministers) may obtain from NSRPA, upon request, all the information necessary to the exercise of their duties and demand access to all factual data and documents if it is reasonably necessary to the fulfilment of their duties (new Section 12).

- The Minister of Infrastructure and the Environment has to consult with the Minister of Economic Affairs (and other Ministers) before making use of the rules on neglect of duties or before drawing up the five-yearly report to the States General on the NSRPA (new Sections 12d and 12e).

Authorization, Inspection and Enforcement

14. The Netherlands may wish to consider, to the extent possible and unless otherwise covered under existing legislation, further defining NSRPA core regulatory functions of authorization (licensing), review and assessment, inspection and enforcement in a more comprehensive manner as that currently included in the Nuclear Energy Act, as amended by the Draft Bill.

15. As regards authorization (licensing), it is noted that not all fundamental aspects of issuance, renewal, suspension, amendment, revocation and relinquishment of licenses are covered in the Draft Bill or the Nuclear Energy Act. License conditions for each type of facility and activity, following a graded approach, could also be further considered, as well as the ability to prove qualification of personnel, ability to prove that it has the necessary technical facilities, capabilities for preventing and mitigating the consequences of accidents, quality management systems and other relevant aspects. Inspections are also not dealt with specifically in the Draft Bill or the Nuclear Energy Act, while enforcement should normally be addressed in the law in correlation with inspection, including enforcement powers of inspectors, as well as administrative sanctions and offences for non-compliance, which should be commensurate to the significance of the non-compliance for safety. Should the Netherlands wish to address these matters, reference is made to the General Safety Requirements Part 1 (Governmental, Legal and Regulatory Framework), in particular to Requirements 23-31, and Chapter 3 of the Handbook on Nuclear Law: Implementing Legislation.

[16] Explanatory Memorandum, page 14, 831-870.

16. In connection with enforcement, it is noted that, as provided in new Section 58(1), other bodies, in addition to NSRPA, are entrusted with the duty to enforce the provisions of the Nuclear Energy Act, pursuant to the "Appointment of Inspectors and Fulfilment of Duties (Nuclear Energy Act) Decree 2013".[17] If any such functions are assigned to bodies or Ministers conducting promotional or development functions in the field of nuclear energy, these should be transferred to NSRPA.

Power to Issue Regulations

17. New Section 3(3)(c) of the Nuclear Energy Act provides that NSRPA will be responsible for evaluating, preparing and advising on "regulations". Sections 26, 35 and 76 of the Nuclear Energy Act refer to the procedure for preparation and issuance of regulations (i.e. an "Order in Council" or a "Ministerial Decree"), which remains under the responsibility of the Ministers of Economic Affairs, Social Affairs and Employment and Public Health, Welfare and Sport, as appropriate. Furthermore, while the Draft Bill provides for the possibility to grant NSRPA, through administrative order, the power to "lay down further rules concerning organizational or technical matters in the area of nuclear safety, radiation protection and security" (new Section 4), the Minister of Economic Affairs and other Ministers still retain the power to "impose further rules on (certain) matters regulated by Order of Council" (Section 76(3)). This appears to be an overlap of regulatory functions and should be avoided.

18. In this regard, it is recalled that the Minister of Economic Affairs is responsible for energy policy, including policy of nuclear energy, and for supporting companies or organizations responsible for development of nuclear energy.[18] Therefore, the Draft Bill transfers to NSRPA many of the regulatory functions originally assigned to the Minister of Economic Affairs (and other Ministers) under the Nuclear Energy Act. However, to ensure a high level of independence, the powers to propose regulations and lay down rules on nuclear safety currently assigned to the Minister of Economic Affairs should also be transferred to NSRPA. If the Netherlands legal and institutional system does not allow such an arrangement, these regulatory functions should be transferred to another appropriate body not having development responsibilities in the nuclear field.

19. It is thus suggested that NSRPA or other appropriate body not involved in promotional activities be designated as the competent authority for matters pertaining to regulations. In particular, with a view to furthering independence and avoiding overlaps, NSRPA should be designated as the only competent authority to lay down further rules pursuant to an "Order of Council" or a "Ministerial Decree", as still currently assigned in some areas to the Minister of Economic Affairs (and to other Ministers if responsible for promotional activities in the field of nuclear law). Provisions of the Nuclear Energy Act that may need to be revised in this context include, *inter alia*, sections 1(2), 15f(1), 26(2), 35, 37a and 76.

Other Regulatory Functions

20. The duties assigned to NSRPA, as resulting from the provisions of the Draft Bill, do not appear to cover all regulatory functions normally associated with the regulatory control of nuclear activities and facilities. Furthermore, some of the duties assigned to NSRPA pursuant

[17] Explanatory Memorandum, page 16, 941-959.
[18] Explanatory Memorandum, page 14, 831-870.

to new Section 3(3) could be usefully clarified, in line with the description provided in the Explanatory Memorandum. This is particularly the case for the duties relating to providing information (3(3)(d)), supporting national organizations with knowledge (3(3)(e)) and doing research in support of the exercise of its duties (3(3)(f)).[19] Accordingly, if not covered under other national legislation, the Netherlands may wish to consider some of the following additional/expanded functions for NSRPA:

- To obtain the advice or views of experts necessary for the performance of its functions, through, inter alia, the hiring of consultants, the contracting of specific projects, or the establishment of permanent or ad hoc advisory bodies;
- To establish and maintain a national register of radiation sources;
- To establish regulatory measures for the security of nuclear and other radioactive material, and their associated facilities, including measures for the detection, prevention and response to unauthorized or malicious acts involving such material, or facilities;
- To participate in the definition of the design basis threat for the implementation of security provisions;
- To communicate directly with other governmental bodies in all circumstances it considers necessary for the effective exercise of its functions;
- To carry out or arrange for the conduct of research on radiation safety and security necessary to implement its functions*;*
- To cooperate with other governmental or non-governmental bodies having competence in such areas as health and safety, environmental protection, security and transportation of dangerous goods;
- To exchange information and cooperate with regulatory bodies in other States and with relevant international organizations concerning matters arising from the exercise of its functions;
- To establish appropriate mechanisms and procedures for informing and consulting the public and other stakeholders about the regulatory process and the safety, health and environmental aspects of regulated activities and practices, including incidents, accidents and abnormal occurrences;
- To obtain information, documents and opinions from private and public organizations or persons as may be necessary and appropriate for the conduct of its functions.

Conclusions

21. The Draft Bill is a significant step for the creation of an independent regulatory body in the Netherlands. However, as explained above, some revisions to the Draft Bill may still be considered, in line with the relevant international legal instruments, IAEA safety standards and guidance documents.

[19] Explanatory Memorandum, Notes on individual sections, pages 1-3.